

**82 - 1091**  
NO. \_\_\_\_\_

Supreme Court, U.S.  
**FILED**

**DEC 28 1982**

ALEXANDER L. STEVAS  
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

DR. HEWITTE A. THIAN,

Petitioner,

versus

SUSAN WILKINSON RAY, ET AL,

YANCEY WHITE

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Edward C. Alker  
Attorney at Law  
Post Office Box 8252  
Metairie, Louisiana 70011  
504/837-0330

ATTORNEY FOR PETITIONER

## **QUESTIONS PRESENTED FOR REVIEW**

1. Question as to whether Louisiana provides under Article 2315, "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it;" a remedy for a doctor when an attorney sues a physician or another professional man and to continue the suit for several years after it has been proven to him that the suit has no foundation and causes mental, professional and financial damages.

2. Whether or not an Attorney can defame a physician and after repeatably being proven that the case is unfounded and said Attorney continues to pursue the unfounded suit, as to whether or not this constitutes malice, defamation and etc. and the doctor can recover damages.

3. Whether or not all of these questions are not a question of fact for the jury, malice, defamation, negligence.

## **PARTIES**

This petition seeks review of two judgments of the United States Court of Appeals for the Fifth Circuit which were virtually identical or so closely related that a single petition for writ of certiorari is appropriate for both cases. That in the case of Lambert vs. Wattingny, 3rd Circuit Court of Appeals, 408 So. 2d 1126, clearly allows under the Law of the State of Louisiana, one professional man to recover damages and to repair the damages under Article 2315 and for malice and defamation.

Yancey White, Attorney and Susan Wilkinson are parties to this suit.

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

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The petitioner, Dr. Hewitte A. Thian, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 19, 1982.

**JURISDICTION**

The judgments of the United States Court of Appeals were entered on July 19, 1982 and timely petitions for rehearing and rehearing en banc were denied on August 31, 1982. (Pages A-1-A-7) This petition was filed within the time allowed after a proper request for additional time in which to file was filed. This Courts' jurisdiction is invoked under 28 U.S.C. 1254(1)

## STATUTES, RULES AND REGULATIONS INVOLVED

### Louisiana Article 2315

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it;"

### STATEMENT OF THE CASE

An action was commenced in the United States District Court for the Eastern District of Louisiana by respondent, Susan Wilkinson by her attorney, Yancey White, whereby a judgment was ruled in favor of Dr. Hewitte A. Thian. Our action entitled Dr. Hewitte A. Thian vs. Susan Wilkinson, et al, Yancey White, whereby we are trying to recover damages to Dr. Thian by the original malpractice suit, negligent handling of the suit by Mr. White, the defendant.

This writ is being taken to the Supreme Court on several basis, one is that under the Louisiana Law Article 2315, everyone is responsible for their own Torts, no one is excluded, no matter what profession they are or what they are. We are probably only one of the States in this Union who deal with problems on this basis and we have already had our Legislature since 1825. Under our code, Article 2315, which takes care of a situation just as we have in Thian vs. Wilkinson. Thian vs. Wilkinson is a classic case and certainly is in a great minority in the United States. A study of 71,782 claims closed nationwide during the years of 1975 and 1978 and reported by about 100 insurance companies to the National Association of Insurance commissioners showed that 62% of the claims were closed with no payment and had no merit. *R. Moritz and A. Moritz v. Dr. N. Patton and the Law*, 450 (5th Edition 1971) and the National Association of Insurance Commissioners Medical Malpractice Closed

Claims. 1975-1978, No. 2, Sept. 1980. However many of these cases are unfounded and malicious suits, and that is the suit that we are dealing with here today in Thian vs. Wilkinson. Louisiana not only has Louisiana Civil Code Article 2315 to protect any persons from negligence or malicious and unfounded suits filed against him the doctors have, in Act 817 of 1975 of Louisiana Legislature created a medical review panel to evaluate prior to the filing of suits, claims of physicians in row under the act, Louisiana Supreme Court has upheld the constitutionality of the review panel stating the review panel was designed to weed out frivolous claims without the delay of expensive trial courts, and this of course would weed out unfounded and malicious claims. The suit against Dr. Thian that was filed by Wilkinsons' attorney without any investigation or reasonable basis. In reading through the pleadings it will be determined that Susan Wilkinsons' psychiatrist in Jackson, Mississippi who knew nothing about surgery or anything about the supposive medical problems that she had, supposedly told the attorney that she had this syndrome which is Cushings Syndrome and should not have been operated on. Even after the suit was filed against Dr. Thian, the Louisiana lawyer was apprised of the fact that the suit had been erroneously filed and was aware of the fact that Dr. Thian had full intentions of filing suit against, not only Susan Wilkinson, but all the attorneys involved if the suit was not dropped because it had no foundation. That attorney was never heard from again. The Attorney, Yancey White, who is one of the defendants in this matter, continued to pursue this matter even though he knew that this was not a valid claim and his breach of his code of professional responsibility. Mr. White was also apprised of the fact that this was causing Dr. Thian harm in many ways, by increasing his insurance premium, reduction in business and it was creating problems by having insurance companies not insure him and he could not be



affiliated with any hospital. It almost wrecked his practice. At the time of the pre-trial and the facts were up front in Wilkinson vs. Thian, the Federal Judge, the Honorable Adrian Duplantier stated, after hearing the facts, to Mr. White, "it sounded like the diagnosis had been mis-diagnosed", this was after bringing out the testimony of the various people and what had been done in this matter, again Mr. White was then apprised of the fact that he should withdraw this suit to prevent any further harm to Dr. Thian. This he did not do. He took a deposition of a Jeffrey A. Sadler, M.D. on July 27, 1978 before Kelly Hart in San Diego, California, the deposition clearly states that there is no Cushings Syndrome, as indicated from the records obtained from Dr. Jeffrey A. Sadler. Again, Mr. White was advised and apprised to abandon the suit and stop the harm and the financial and mental hardship that he had placed upon Dr. Thian these past years. The plaintiff, Susan Wilkinson in the Wilkinson vs. Thian case went to California and was seen by one Jeffrey A. Sadler, M. D. who practices internal medicine and is not a surgeon, as per his deposition, given on July 27, 1978. Present, at the time of his deposition, was defendant in this suit who is Mr. Yancey White, and Edward Rice of Adams and Reese of New Orleans, Louisiana who represented the Insurance Company of Dr. Thian and in that deposition on page 11, 12, and 13, Dr. Sadler clearly states that Mrs. Susan Wilkinson did not at any time, have Cushings Syndrome, that all the records indicate that whatever she had, the records indicate that that she did not have anything that would produce Cushings Syndrome. Therefore, Mr. White knew, from pages 11, 12 and 13 of the deposition of Dr. Sadler which is attached hereto and made a part hereof that there is no way that this woman could have had Cushings Syndrome and was advised by Edward Rice who is the Attorney for Dr. Thians Insurance Carrier

to withdraw the suit against Dr. Thian because it was improper, unjust and had no foundation. Mr. Yancey White continued on and did not withdraw the suit even after proof from his own doctors that there was no Cushings Syndrome and that Mrs. Susan Wilkinson did not have Cushings Syndrome. After this, Yancey White was advised by Mr. Rice several weeks before the trial as per his affidavit in this suit that if he would just get the records from the hospital he would see that there was no Cushings Syndrome involved in the suit against Dr. Thian which was the only question involved, therefore, the suit should be dropped and Yancey White did not get the records which clearly establish that Susan Wilkinson did not have Cushings Syndrome and that the operation was correctly performed by Dr. Thian and that there could be no possible malpractice. The first time that the records were obtained was when Eddie Rice got the records just before the trial and gave them to Yancey White and he still did not dismiss the suit, he therefore continued on with an absolutely baseless suit. It is clear that the physicians that had referred cases to Dr. Thian were not going to refer any more to him until this matter was straightened out, and by Mr. White realizing this, he was certainly acting negligently and with malice by not dismissing the suit which had absolutely no foundation at all, therefore Dr. Thian sustained monetary losses, anxiety, attorney fees, loss of reputation, loss of patients and increase in insurance premiums.

#### **BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT**

Jurisdiction of this cause in the District Court was based upon diversity of citizenship and the amount involved which was in excess of \$10,000.00 exclusive of interest and costs 28 U.S.C. 1332.

## ARGUMENT AND REASONS FOR GRANTING THE WRIT

A study of 71,782 claims was made closed nationwide during the years of 1975 through 1978 reported by 100 Insurance Companies to the National Association of Insurance Commissioners showed that 62% of the claims were closed with no payment. Only 18% of the cases closed in 1978 were resolved by court deposition, the defendant position won 9 out of 10 cases. The Loyola Law Review, Volumn 27, No. 2, 1981, the article is *A QUEST FOR JUSTICE AGAINST A WRONGFUL MEDICAL PRACTICE SUIT, LOUISIANA'S UNIQUE ADVANTAGE* by Donald J. Palmasano. Subsequently, all sorts of unmeritorious, unfounded and malicious suits are filed without any investigation, any confirmation of the lawyers, even from their clients, statements to them as to how this malpractice occurred. Louisiana has set up medical review panels by Act 817 of 1975 Louisiana Legislature which reviews these various claims to weed out the frivolous claims without delay and expense of a court trial.

Under the Louisiana Code Professional Responsibility Articles 16,10 and 1, a lawyer is charged with the duty to not counsel or maintain any suit or proceeding which shall appear to the attorney to be unjust or any defense except which you believe to be honest and undebatable under the law of the land. Therefore, an attorney has the responsibility to determine whether or not the filing of a suit will do more wrong to the physician that it possibly could do good for the plaintiff. If an attorney does do this, it is a violation of his oath in addition to the bar to pursue such an action. In the case of Wilkinson, Mr. White knew at all times throughout the entire proceedings, from the beginning of the suit through all the intervening factors that this suit was wrong, that it was brought unwrongfully and that it

should have been dismissed. Harmlessness to the physician and unfairness exists because the physician is unable to obtain a remedied or repair the harm by a wrongful suit. These circumstances can lead ultimately to defensive medicine, or the restriction or unavailability of medical care.

The harm that results when a wrongful suit is filed includes embarrassment, loss of time, defense costs, injury to reputation and resulting loss of practice, stress and anxiety, higher insurance premiums, and the increasing possibility of cancellation of the physicians insurance. Some hospitals refuse to let physicians practice without malpractice insurance. This could almost eliminate some doctors' practice completely, such as Dr. Thian who has to operate to make a living.

The courts throughout the country has placed a large burden upon the physicians and their regress to such harm has been needlessly upheld. The State Supreme Court level has held in a countersuit by a doctor, *Bull vs. McCuskey* in 615, p. 2d 957 in Nevada of 1980, this was a breakthrough when the physician was able to counter sue and collect for the damages for a wrongful suit by an attorney.

The theory of recovery by many throughout the common law and the civil law states the recovery of malicious prosecution, abusive process, prima facie tort, defamation, negligence and a violation of constitutional rights have all been set forth. Louisiana has finally upheld the fact that a professional man can sue another professional man for whatever damages he has caused, *Lambert vs. Wattigny*, 3rd Cir. Ct. of Appeal, 408 So.2d 1126, this was urged to the United States Court of Appeals on the rehearing because it came out after the original court of appeals judgment and even though the Court of Appeals stated that the trial judge was following

the Louisiana law. Louisiana law has now recognized, under Article 2315 in the *Lambert vs. Wattigny*, 3rd. Cir. Ct. of Appeal, 408 So.2d 1126, a professional man can be sued for this negligence and for his lack of diligence in investigating a claim before he causes harm to a professional man, in the case of Dr. Thian. Dr. Thian had a very extensive practice in abdominal surgery, this particular suit was filed by Susan Wilkinson and his practice became practically nil. We have submitted all of the affidavits and statistics which are in the file, they are part of the summary judgment plus the fact that he had an increase in the cost of insurance plus the fact that he had to pay over \$10,000.00 in cost for Attorneys fees to defend the suit, now if this suit was an irresponsible suit and should not have been filed and even after it had been filed, by simple investigation they could have discovered that by merely looking at the hospital charts or the work up of operation they could have clearly seen that there was no Cushings Syndrome, that this suit should have been dropped. The defendant had, on many occasions, warnings and advice to drop this suit because it was causing harm and that it was frivolous and he chose not to do so and I respectfully suggest that if he chose not to do so that he is responsible for the results of his negligence. In a recent case of *Nelson vs. Miller*, 227 Kansas, 271, 607 p. 2d 438 (1980) the Kansas Court reversed the trial courts dismissal of a physicians suit against attorneys that filed a malpractice suit against them. The existance of a malpractice or wrongful suit, the court observed, is ordinarily a question of fact for the jury. This is all that Dr. Thian wants, he wants the same advantages and the same privileges as Mr. White had to prove that Mr. White harmed and damaged the Doctor through his negligence. Mr. White was endeavoring to say that Mrs. Wilkinson was harmed as a result of the Dr.'s negligence, we merely want the same rights. Under Article

2315, Louisiana Courts are different in the Common Law Courts of the United States, we have already provided for the negligence of someone whether he be lawyer, doctor or Indian Chief, that if he causes any damages as a result of his negligence he is responsible for it and we have a right under article 2315 to have this case tried by the jury if by no other law or laws which of course that we claim that we do have, we claim that his is absolutely gross malice on the part of the defendant because he had an opportunity to explain to Mrs. Wilkinson on many occasions that this was not a proper suit because they could not prove it. That there was absolutely no Cushings Syndrome present and no one said, other than the psychiatrist, that it could be present. That all of this information, of course, and putting the doctor in a position to pursue and spending excess money on insurance premiums and legal fees, plus the stress and loss of business is certainly attributed to this particular law suit by Mr. White and Mrs. Wilkinson and the doctor has a right to recover for it. The plaintiff certainly has also been a victim of being inflicted by intentional harm resulting in damage, without excuse or justification, he also had his reputation and good name defamed as a result of this and as in *Bull vs. McCuskey*, and in the *Handley vs. Lund*, 218 Cal. Apps. 2d. 633 32 Cal. Rptr. 73, Court of Appeals, 1963, where a physician won a slander suit against a lawyer who sued him for malpractice, the attorneys made false accusations about the doctor and the doctors were able to recover for it. It is respectfully alleged by Dr. Thian that he should have the same rights as Mr. White and that is to have a jury to determine the facts, damages and his entire claim for negligence against Mr. White. Therefore, we respectfully request a trial by jury.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted

Edward C. Alker m.a.s.

Edward C. Alker

Edward C. Alker  
Attorney at Law  
P.O. Box 8252  
Metairie, Louisiana 70002  
504/837-0330  
Attorney for petitioner

## CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon counsel for respondents this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

John R. Martzell, Esq.  
338 Lafayette Street  
New Orleans, La. 70130

*Edward C. Alker, Jr.*

DATED DECEMBER 29, 1982.